In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 343

JOSEPH H. CUDIA AND JOHN TURNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 346 F. 2d 227.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1965. A petition for rehearing was denied on June 15, 1965. The petition for a writ of certiorari was filed on July 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment stated an offense.

2. Whether the motion for a bill of particulars was properly denied.

787-058—65

3. Whether petitioners were entitled to a list of the government's witnesses.

4. Whether evidence seized without a warrant should have been suppressed.

5. Whether petitioners were afforded a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to violate internal revenue laws governing the manufacture of intoxicating liquor (18 U.S.C. 371; 26 U.S.C. 5601, 5602). Each petitioner was sentenced to imprisonment for five years (the sentences required each petitioner to serve the first six months of the term and thereafter placed him on probation) and to a fine of $1,000 (R. 5–6, 57–58). The court of appeals affirmed.

The government's evidence showed that, on April 6, 1963, at about 1:00 or 2:00 a.m., a detective in the office of the sheriff of Winnebago County, Illinois, telephoned petitioner Cudia at his home, requesting him to accompany officers to a building which he owned in Rockford.[1] Cudia voluntarily went with the officers to the building which he said was rented to a Negro man who had given the name of Scott

[1] Cudia, who testified in his own behalf, described the premises as a large triangular tract lying next to the railroad in an outlying district of Rockford. On it was a large old residence, which Cudia had converted into four apartments. About one hundred ten feet distant was a frame structure consisting of two stories and a basement, sometimes referred to in the evidence as a barn but which had originally been ancillary to a greenhouse, now torn down (Tr. 593–598).

Dullard and who had said that he was from Chicago. Cudia said that the tenant had not paid his month's rent in advance and gave his permission for the officers to enter. Cudia himself attempted unsuccessfully to force the door, which was ultimately opened by the officers. Cudia entered first and turned on the lights, followed by the officers. The basement of the building was found to contain a still, consisting of a 55-gallon drum packed with asbestos over four burners, with pipes leading to a cooling barrel and a receptacle. The still was warm but was not in operation. The officers also found twenty gallons of moonshine whiskey and a large quantity of whiskey mash (Tr. 137–157, 198–202, 207–216). There was no sign to indicate registration of the still (Tr. 166).

Cudia denied knowledge of the still. One officer testified that Cudia said that he had done some wiring on the building and had run the gas line to the building (Tr. 169, 213). The officers found two empty and two partly filled sacks of Grant-Wilson 507 asbestos cement, forty cartons, each containing four one-gallon glass jugs, and some copper tubing. Cudia took the tubing and some tools upstairs, saying that they were his. He said that he helped to carry in some of the drums, but that they did not belong to him. Cudia also said that he did not know how anybody got in the part of the building where the glass jugs were, as he had the key to that portion of the building, which was separated by a partition (Tr. 162–164, 169). In the yard was a 500-gallon drum of propane gas, with a copper tubing line leading to the

building and to the burner under the still (Tr. 165).[2]

The evidence showed the following additional facts tending to connect petitioners with the still. On March 7, 1963, Cudia purchased a sixty-foot coil of 3/8" copper tubing, a sixty-foot coil of "Type L" tubing and a number of small items from Mott Brothers Co., a concern in Rockford (Tr. 277–278). On March 12, Cudia and a Negro man bought two 100-pound tanks of propane gas from Mitchell Radio and Appliance Co. in Rockford. Cudia said that the gas was for heating water and cooking in a restaurant. While the two Mitchell employees who sold the gas to Cudia did not identify Turner as being the Negro man with him, one thought Turner "favored" a photograph he had previously identified (Tr. 115–135, 384–402). Cudia said that future deliveries would be to Box 338 Cunningham Road and gave directions to get there. On March 20, payment was made to the Mitchell company for a 100-pound can of propane gas to be delivered to the Cunningham Road address. The following day, a Negro man who identified himself as "Phil" of "Phil's Restaurant" cancelled the order and received a cash refund for which he signed as "Phil Jones" (Tr. 405–414).

On March 21, Cudia bought two fifty-pound bags of Grant-Wilson 507 asbestos cement from Mott Brothers and duplicated this purchase on March 28. Mott

[2] On April 10, 1963, a Treasury agent talked with Cudia at his home. Cudia said that in March he had rented the basement of the building for $50 to a man named Scott Dullard for the storing of merchandise. Cudia also said that he had helped take two fifty-gallon steel drums into the basement.

Brothers was the only franchised dealer for this cement in Rockford. The sales to Cudia were the only sales made between December 31, 1962, and April 23, 1963 (Tr. 273, 277, 296–303).

On March 21, 1963, after a telephone call from a one-family residence, where the rent was paid by petitioner Turner, to the Skelgas Division of Skelly Oil Co. at Beloit, Wisconsin (Tr. 372–381, 310–311), a delivery was made to the intersection of Pierpont and Cunningham in Rockford, Illinois, of a 500 gallon tank for propane gas containing as much gas as the law permitted to be carried in the tank. A Negro man in a green Cadillac, recognized as being six or seven years old, met the delivery, signed a receipt in a name that appeared to be "Art Thomas" and directed the driver to Box 338, Cunningham Road, where the installation was made. The bill for filling the tank was paid on April 8 by a male Negro (Tr. 313–325). On April 11, the Skelgas company received a call from a man who identified himself as Turner. The manager testified that his recollection was refreshed by his previous statement that the person calling said "they are bringing me up for identification. You do not know me or recognize me." (Tr. 327–331). A Negro was subsequently brought to the office, but the manager was unable to identify him (Tr. 332). Asked whether Turner was the man who received delivery, the manager said, "I am not sure. I don't know." (Tr. 335–341). It was shown that on February 2, 1963, a 1953 green Cadillac was sold to petitioner Turner and that he signed the papers

(Tr. 345–348). A government handwriting expert testified that the signature of "Art Thomas" on the delivery slip for the 500-gallon propane gas tank, the signature "Phil Jones" on the return receipt for the 100-pound gas tank to the Mitchell company, and the signature of petitioner Turner on the used car papers and other documents were all made by the same person (Tr. 487–507).

There was no testimony on behalf of Turner. Testifying in his own behalf, Cudia explained his actions as follows. He stated that he bought the two bags of asbestos from Mott Brothers to use on top of one of the two furnaces at his home. About two weeks later he bought two more bags and put them on top of his second furnace (Tr. 649, 654, 666, 761, 705–706). He bought the 3/8" copper tubing for use at home, but did not do the work and had it stored in his truck. He produced a coil of tubing which he said was the one purchased (Tr. 666–668). His purchase of two 100-gallon tanks of propane gas from the Mitchell Company was occasioned by negotiations with a Negro man, who gave his name as Phil Jones, and said he was from Chicago, to rent the second floor of the building where the still was found as a restaurant. Cudia stated that, although he promised to make improvements upon Jones' statement that he (Jones) would pay three months' rent in advance, he ran into difficulties about tearing down a condemned house and was unable to make the promised changes. Jones called him, expressing his disappointment, and Cudia never heard from him again (Tr. 608–615).

Cudia further testified that another Negro who gave the name of Scott Dullard, and who also said that he was from Chicago, approached Cudia wanting a place in which to store merchandise. Cudia agreed to rent the first floor and basement of the building where the still was found to him for fifty dollars a month. Cudia said that he knew nothing of the still and that he had given his consent for the search (Tr. 617–620). He said that he barely knew Turner and had never seen him around the property (Tr. 668–686).

ARGUMENT

1. The indictment adequately stated an offense. It charged that between March 7 and April 6, 1963, in the Northern District of Illinois, petitioners conspired to have in their possession and control an unregistered still, to carry on the business of unbonded distiller, to make and ferment mash fit for the production of distilled spirits on unauthorized premises, and to defraud the United States of taxes due on distilled spirits, specifying the statutes violated as to each of these. The overt acts alleged as to Cudia related to the purchase of materials for the operation of a still, while the act alleged as to Turner related to his signing under a false name a receipt for a 500-pound propane gas tank (R. 5–6). It is not necessary that the overt acts be in themselves criminal, only that they be in furtherance of the conspiracy. *Yates* v. *United States,* 354 U.S. 298, 334.

2. The trial court did not abuse its discretion in denying Turner's motion for a bill of particulars. This motion requested (1) the names of all parties

to the conspiracy, (2) the dates and places of the alleged conspiracy and (3) the acts and declarations of the parties in furtherance of the alleged conspiracy (R. 18). The information requested by (1) and (2) appeared in the indictment. As to (3), such details of evidence need not be given. *Wong Tai* v. *United States*, 273 U.S. 77, 82–83.

Petitioner Turner also sought by pre-trial motion a complete list of the government witnesses (R. 30). Such information is required to be given only where the charge is treason or a capital offense. 18 U.S.C. 3432.

3. Only Turner moved to suppress the evidence in the court below. Cudia could not, in any event, complain of the search because of his admitted voluntary consent thereto. It is here urged that Cudia could not validly give consent for the search because the relationship between Cudia and Turner was that of landlord and tenant. Turner, however, did not claim that he was a tenant of the premises and the government's position, sustained by the jury's verdict, was that the petitioners were engaged in a conspiracy to operate the still. As a co-conspirator with at least an equal right to possession of the premises, Cudia could validly give permission to search. See *United States* v. *Sferas*, 210 F. 2d 69, 74 (C.A. 7), certiorari denied *sub nom. Skally* v. *United States*, 347 U.S. 935; *Roberts* v. *United States*, 332 F. 2d 892 (C.A. 8).

4. Petitioners' contention that they did not receive a fair trial is centered upon the claimed insufficiency of the evidence. As the Statement, *supra*, pp. 2–7,

shows, however, the circumstantial inference of guilt as to both petitioners was substantial. Cudia, for example, owned the premises and was directly tied to the purchase of much of the equipment found at the still while Turner was directly implicated through his signature on the receipt for the propane tank and the circumstances under which the tank was ordered and delivered. Finally, the written statement which state officers obtained from Cudia was introduced in evidence by Cudia rather than by the government (Tr. 223–226).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

SEPTEMBER 1965.

U. S. GOVERNMENT PRINTING OFFICE : 1965